APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

Before AINSWORTH, Circuit Judge, and COX and RUSSELL, District Judges.

BY THE COURT:

The parties to this suit have stipulated: "That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964;* (language of 42 U.S.C. 1973c)." (See Stipulation, dated September 25, 1967, attached as Appendix A.)

This complaint was filed on October 20, 1966 by three named plaintiffs, Reverend Clifton Whitley, Dock Drummond and Emma Sanders, on behalf of themselves and all other persons similarly situated, as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. In the complaint plaintiffs prayed that this Court adjudge and declare House Bill 68, Mississippi Laws 1966 (sometimes referred to as Chapter 613 of the Mississippi Laws of 1966), which amended Section 3260 of the Mississippi

Code of 1942, to be in violation of Section 5 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution; that a preliminary and permanent injunction issue enjoining defendants from enforcing Chapter 613, from failing to accept the petitions of the named plaintiffs as independent candidates in the November 8, 1966 Mississippi general election, and from failing or refusing to include the names of plaintiffs, and all other similarly situated, as candidates who qualify on the official ballots for the November 8, 1966 general election.

A three-judge District Court was requested and thereafter convened for a hearing at Biloxi, Mississippi, on October 26, 1966. The Court, under its full equity jurisdiction, suspended the application of House Bill 68, Mississippi Laws 1966, and ordered that the names of the plaintiffs who were candidates for national office be placed on the ballot to be used by the electors at the general election in Mississippi on November 8, 1966. The Court did not pass on the question whether House Bill 68 denies or abridges any right to vote on account of race or color as provided by 42 U.S.C. § 1973c.

Subsequently, counsel for complainants requested that we set this case for hearing on the merits, and a Stipulation was entered into on September 25, 1967 between counsel for complainants and defendants which has been filed herewith in the record and is submitted to eliminate the need for further hearings in this case.[1] Plaintiffs submitted their brief on October 6, 1967 and defendants' reply brief was received on October 18, 1967. Plaintiffs seek a prompt decision on behalf of the class of plaintiffs who have attempted to qualify and run as independent candidates in the impending Mississippi general election on November

[1] See letter dated September 25, 1967 to counsel for plaintiffs to the members of this Court reproduced as Appendix B.

7, 1967. The matter, therefore, is before us on the merits for final decision.

House Bill 68, Mississippi Laws 1966, amended the existing Mississippi law by making four changes from the original statute as follows: (1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the numbers of signatures of qualified electors needed on the petition of an independent candidate have been increased; (3) each qualified elector must personally sign the petition for an independent candidate and include his polling precinct and county; and (4) the time for filing as an independent candidate is substantially earlier. All such amendatory sections apply equally to white and Negro candidates.[2]

According to the Stipulation, it is clear that the State of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is, therefore, subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) and that said State was affected by the aforesaid provisions on June 11, 1966 (when House Bill 68, Mississippi Laws 1966, was enacted) and continuously to this date. It is also true that the State of Mississippi in enacting House Bill 68, Mississippi Laws 1966, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that it did not submit said statute either to the United States District Court for the District of Columbia for a declaratory judgment, that such enactment does not have the purpose and will not deny

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[2] In 1927, the Supreme Court of Mississippi interpreted this statute which was then Section 3717, Mississippi Code of 1906, in *Ruhr* v. *Cowan*, 112 So. 386. After amendments, the statute became Section 3260, Mississippi Code of 1942. Following a ruling of the Court in *Bowen* v. *Williams*, 117 So. 2d 710, the 1966 amendment followed.

or abridge the right to vote on account of race or color, or to the Attorney General of the United States for his approval or objection. The Court notes that 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) is concerned with enactments by a state with respect to which the prohibitions set forth in § 1973b(a) are in effect, and in order to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or in effect on November 1, 1964, such state must institute the declaratory action in the United States District Court for the District of Columbia or submit the matter for approval or rejection to the Attorney General of the United States.

The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965.

The State of Mississippi, prior to this Act, suspended its enforcement of statutory voter qualifications, including tests of literacy, and the Court takes judicial notice of the fact that over 160,000 Negroes have qualified to vote since 1963. Cases cited in plaintiffs' brief have been noted, and none show the application of Section 5 of the Voting Rights Act of 1965 to the kind of statute here involved. The legislative history of the Act is indicated in both plaintiffs' and defendants' briefs, citing portions of a hearing before the Judiciary Committee of the Senate. These exchanges between Attorney General Katzenbach and the

senators are confined to questions involving qualifications of voters. On the 1966 motion in this case, the Court took jurisdiction under 42 U.S.C.A. § 1983 and § 1973c but made no application of § 1973c to the ruling therein. It declines to do so here.

The Court judicially knows (from all but seven counties in Mississippi in which the information was not available) that sixty-seven Negroes did qualify as candidates in the Democratic primary elections of 1967 and seventeen were nominated for the general election.

The motion for an interlocutory injunction is accordingly denied, and the complaint in its entirety is without merit and is dismissed.

The judgment incorporating this per curiam opinion by reference thereto may be presented and signed by the managing judge of this Court as the order of the entire Court.

ROBERT A. AINSWORTH, JR.
United States Circuit Judge

WILLIAM HAROLD COX
United States District Judge

DAN M. RUSSELL, JR.
United States District Judge

Dated:

[Appendices A and B to Opinion of the District Court]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4025

CLIFTON WHITLEY, ET AL., *Plaintiffs*

v.

PAUL B. JOHNSON, Governor of the State of Mississippi, ET AL., *Defendants*

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for all of the parties as follows:

1. That the state of Mississippi is a State with respect to which the prohibitions set forth in 42 U.S.C. § 1973b(a) (Voting Rights Act of 1965) are in effect and is therefore subject to the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965). The State of Mississippi was affected by the aforesaid prohibitions and subject to the aforesaid provisions on June 11, 1966 and continuously to this date;

2. That the State of Mississippi, in enacting House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, did not comply with the provisions of 42 U.S.C. § 1973c (Section 5, Voting Rights Act of 1965) in that the State of Mississippi did not submit said statute *either* to the United States District Court for the District of Columbia for a declaratory judgment *or* to the Attorney General of the United States for his approval or objection. This is not to be construed as a concession by the defendants that the State of Mississippi was under any lawful obligation to so comply with the provisions of 42 U.S.C. § 1973c;

3. That one or more Negro independent candidates for political office in the Mississippi general election scheduled

for November 7, 1967 has or have been challenged and disqualified from having his or their names placed on the ballot in said election by virtue of having certain provisions of House Bill 68, Mississippi Laws 1966, which amended Section 3260, Mississippi Code of 1942, applied to him or them. In particular, the following provisions of said statute have been applied to one or more of said Negro independent candidates who attempted to so qualify:

> "No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election . . ."

4. That some of the aforesaid Negro independent candidates who have been so challenged or disqualified are members of the class of plaintiffs described in the complaint herein;

5. That the only issue before the Court at this time is whether or not House Bill 68, Mississippi Laws 1966, which amended Section 3260 of the Mississippi Code of 1942, is an attempt by the State of Mississippi *to enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964;* (language of 42 U.S.C. 1973c).

6. That this stipulation shall be filed with the Court.

Dated: September 25, 1967

ALVIN J. BRONSTEIN
Attorney for Plaintiffs

Dated: September 25, 1967

WILL S. WELLS
Attorney for Defendants

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
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ALVIN J. BRONSTEIN, CHIEF STAFF COUNSEL

September 25, 1967

Hon. Robert A. Ainsworth, Jr.
United States Court of Appeals
400 Royal Street
New Orleans, Louisiana

Hon. W. Harold Cox
P. O. Box 2447
Jackson, Mississippi

Hon. Dan M. Russell, Jr.
P. O. Box 1930
Gulfport, Mississippi

Re: WHITLEY v. JOHNSON
Civil Action No. 4025(J)

To the Judges of this Honorable Court:

Mr. Wells, on behalf of the defendants, and myself have finally entered into a stipulation in the above cause. We have today filed the original and three copies of same with the Clerk in Jackson, but I am enclosing additional copies herewith so that the Court may see that we have stipulated both as to all of the facts as well as to the sole issue we believe to be before the Court at this time.

Since all of the parties would hope to obtain a ruling from the Court prior to the November 7, 1967 general election in Mississippi, Mr. Wells and I have agreed that I will submit a brief on behalf of the plaintiffs within ten days from today and Mr. Wells will submit his brief on

behalf of the defendants within ten days after he receives plaintiffs' brief, all, of course, subject to any different or further direction from the Court.

Both Mr. Wells and myself would welcome the opportunity, if possible, to attend before the Court for the purpose of answering any questions the Court might have, as well as to amplify our written argument.

Respectfully,

ALVIN J. BRONSTEIN
Alvin J. Bronstein

cc: Will S. Wells, Esq.

APPENDIX B

The text of section 3260, as it was before and after the 1966 amendment, follows. Brackets indicate material deleted by House Bill No. 68; italics indicate material added by House Bill No. 68:

3260. Ballots; what to contain.

The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent*

candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections. The commissioner shall [also] have printed on the ballot in any [general or special] election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition *filed on or before the statutory time* [with said commissioner not less than forty (40) days prior to the election], and signed by not less than the following number of qualified electors:

(a) For an office elected by the state at large, not less than [one thousand (1,000)] *ten thousand (10,000)* qualified electors.

(b) For an office elected by the qualified electors of a supreme court district, not less than [three hundred (300) qualified electors] *three thousand five hundred (3,500)* qualified electors.

(c) For an office elected by the qualified electors of a congressional district, not less than [two hundred (200)] *two thousand (2,000)* qualified electors.

(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than [one hundred (100)] *one thousand (1,000)* qualified electors.

(e) For an office elected by the qualified electors of a county, a senatorial *district,* [or floatorial district,] *a supervisors district,* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,* or not less than *five hundred (500)* [or not less than fifty (50)] qualified electors, *whichever is the lesser.*

(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000) [not less than fifteen (15)] *ten per cent (10%)* of the qualified electors *of said supervisors district or municipality.*

Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

[Unless the petition required above shall be filed not less than forty (40) days prior to the election,] *Unless the petition required above shall be filed not later than the time required for primary elections,* the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidate represents as provided by law and as certified to the circuit clerk by the State Executive Committee of such political party. In the event such candidate qualified as an independent as herein provided, he shall be listed on the ballot as an independent candidate.

Provided, however, that municipal general elections should be held in the manner provided by Section 62, Chapter 491, Laws of 1950, and the names of persons nominated in the primary elections in municipalities, as provided by section 63 of said chapter 491, Laws of 1950, shall be placed upon the ballot in such general municipal elections, notwithstanding any limitation of time which may be otherwise imposed herein.

Provided further, however, that nothing in this act shall prohibit special elections to fill vacancies in either house of the legislature from being held as provided in Section 3295, Mississippi Code of 1942, as amended. And in all elections conducted under the provisions of Section 3295 the commissioner shall have printed on the ballot the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office by a petition filed with said commissioner not less than five (5) days prior to the election, and signed by not less than fifty (50) qualified electors.

APPENDIX C

Since November 1, 1964 the State of Mississippi has passed at least 18 laws which change voting practice or procedures.

Special Session, 1965

1. Senate Bill 1501 (§ 3209.6*)—modified application form for voter registration
2. Senate Bill 1502 (§ 3209.7)—applicant for voter registration must read and write, and fill out the application form
3. Senate Bill 1504 (§ 3212)—applicant must sign the registration book
4. Senate Bill 1505 (§ 3212.5)—removed requirement that voter be of "good character"
5. Senate Bill 1506 (§ 3235)—summary of who is entitled to vote; voter must be able to read and write
6. Senate Bill 1507 (repealed § 3213)—repealed requirement that applicant interpret section of constitution and explain duties of citizenship
7. Senate Bill 1508 (repealed § 3212.7)—repealed requirement that applicant's name be published
8. Senate Bill 1509 (repealed § 3217-01 et seq.)—repealed right of third parties to challenge registration of a voter
9. Senate Bill 1510 (repealed § 3273)—repealed all aid to illiterate voters; *see United States* v. *Mississippi*, 256 F. Supp. 354 (S.D. Miss., 1966) (three judge court)
10. Senate Bill 1534 (§ 3825.504)—established procedure for transition to council-manager municipal government

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* All references are to the Mississippi Code of 1942, as amended and Recompiled, and show Bill number, Code reference, and subject matter.

Regular Session, 1966

1. House Bill 69 (§ 3119)—party primary expenses paid from public treasury, if party received one-third of vote in last election for governor

2. House Bill 779 (§ 3292, § 3293, § 3294)—revised provisions for elections to fill vacancy in county and municipal offices

3. House Bill 223 (§ 2870)—established procedure for county at-large elections for county district offices; *see Fairley* v. *Patterson,* No. 1058, October Term 1967 (Supreme Court of the United States)

4. House Bill 73 (§ 4062)—allowed court houses in specified counties to be closed on Saturday

5. House Bill 183 (§ 6271-08)—established procedure for appointing county superintendent of education; *see Bunton* v. *Patterson,* No. 1059, October Term 1967. (Supreme Court of the United States)

6. Senate Bill 1966 (§ 6271-03.5)—established procedure for county at-large elections for board of education

7. House Concurrent Resolution 36 (Mississippi Constitution, Article 14, § 271)—amended constitution so that the legislature may consolidate counties, *see M.F.D.P.* v. *Johnson,* Civil Action No. 4082, S.D. Miss.

Regular Session, 1968

1. House Bill 19 (§ 3304)—amending procedure for a special election to fill vacancy for Congress—extending time for holding election, and reducing the number of electors to sign nominating petition from 2,000 (as required by new section 3260, the statute in this case) to 1,000.